83-1975

FILED
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ALEXANDER L. STEVAS,
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NO.

in the Supreme Court of the United States

ORLANDO RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF CONSTITUTIONAL LAW TO SUPPORT THE CHARGE THAT DEFENDANT ORLANDO RODRIGUEZ CONSPIRED WITH WILLIE ESCOBAR, LAURA ESCOBAR, AND THOMAS SNOOK TO DISTRIBUTE COCAINE.

WHETHER THE DECISION BELOW IS IN CONFLICT WITH *UNITED STATES v. JACKSON*, 700 F.2d 181 (5th Cir.1983).

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JUDGMENT AND OPINION OF THE COURT BELOW

On February 24, 1984, the United States Court of Appeals for the Eighth Circuit filed an opinion affirming the conviction of the Petitioner. (App.1-2). On March 22, 1984, the Eighth Circuit entered an order denying the timely filed Petition for Rehearing. (App.3).

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of March 22, 1984, when the Court of Appeals denied the Petitioner's petition for rehearing.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

THE CHARGE

The petitioner (hereinafter the defendant), Orlando Rodriguez, was charged in a one count indictment as follows:

> From on or about February the 1st of 1982, up to and including August the 31st, 1982, in the Western District of Missouri at Kansas City, Missouri; in the State of Florida; and elsewhere, co-conspirators Guillermo Escobar, also known as Willie Escobar, Laura Escobar, defendant Orlando Rodriguez, and coconspirator Thomas James Snook did willfully, knowingly, and unlawfully combine, conspire and agree together and with each other and others to the grand jury unknown, to distribute a Schedule II narcotic controlled substance, that is cocaine.

(T. 3-4, referring to trial transcript).

As part of the conspiracy, the indictment alleged that the defendant and Escobar would and did supply Thomas Snook with cocaine, that Snook would sell the cocaine to third parties, and Laura Escobar maintained records reflecting the financial dealings amongst the co-conspirators, all in violation of 21 U.S.C., Section 846.

The Trial Testimony

THE ARREST OF THOMAS SNOOK

On July 29, 1982, Thomas Snook was observed at the Miami International airport in Florida. Due to his suspicious

behavior, he was questioned. Snook gave the Miami officers a false telephone number, stated that he was in Miami on a pleasure trip visiting Biscayne Bay (a body of water). Additionally, he paid cash for his airline tickets, a common, deceptive practice of drug couriers, because credit card purchases are easier to trace. (T. 40-58; 79). Snook was allowed to proceed to Kansas City. Officers there were alerted and given his description.

D.E.A. Agent Harley Sparks awaited the arrival of Thomas Snook at the Kansas City International Airport. Snook deplaned and was placed under observation. Snook loaded luggage into a cab. The agents were also observing another piece of luggage being loaded into the trunk of the cab and belonging to another individual.

Sparks and other officers confronted Snook, identified themselves, and asked to speak with him. Snook was asked for identification and was advised that he was suspected of carrying drugs in his luggage. (T. 60). Snook denied having any luggage. He also denied having any luggage receipts or claim checks. Snook stated that he had been visiting a friend, Willie, in Miami. (Snook did not mention the name of the defendant, Orlando Rodriguez, or any other name, T.68, and at this point, did not know the defendant and had never met him.) He said he did not know Willie's last name. (T. 66). Snook also denied having an airline ticket. (T. 67).

Sparks agreed upon questioning that Snook's answers were a "bunch of lies." (T. 68). Snook continued to deny ownership of any luggage, whereupon Agent Sparks retrieved the luggage from the back seat of the cab. (T. 62; 64; 66). Sparks confronted Snook with the identification bearing Snook's name. Snook eventually admitted that the luggage was his. Snook opened the luggage and inside were two plastic bags containing cocaine, one of 49% purity, and the other of 87% purity. (T. 45). No fingerprints were lifted from the bags of cocaine, although that practice is often undertaken to see who has handled the contraband packaging. (T. 73).

There was another piece of luggage involved. The luggage belonged to Nizam Cheudhury, a pilot who worked for Bangladesh Airlines and who sat next to Snook on the same flight. Aboard the flight to Kansas from Miami, Snook asked him to pick up the contraband laden luggage, fearful because of the police at the Miami airport who had stopped him. (T. 68-71; 142). Snook did not tell Cheudhury that cocaine was in the luggage. [Snook subsequently testified that he did not care that a totally innocent person could have been arrested for the possession of that cocaine. (T. 142-143).] Snook agreed to cooperate with the government in exchange for immunity. A discussion of his testimony follows.

SNOOK'S TESTIMONY

Snook testified that he became involved in the marijuana business when he was 15 years old. He sold marijuana to high school classmates. (T. 143-44). With profits, he was able to purchase automobiles. (T. 146-47; 150; 152). In 1980, Snook declared an income of $250.00, although he estimated his drug profits at $10,000 to $15,000 for that year. (T. 150-1). He was not at all "bothered" by that lie. (T. 152). In 1981, his drug profits were about $20,000, and were not disclosed to I.R.S. (T. 151). When asked if he ever intended to file income tax returns for the rest of his life, Snook stated that he did not. (T. 172-3).

After high school, Snook worked as an orderly in the recovery room at the Baptist Memorial Hospital, but quit because he was too busy selling marijuana and cocaine. (T. 81; 148). Snook added that he was also busy going to school. Snook described himself as a "student" and had so told officers in the case. But when pressed, he admitted that he was not attending school, but only intended someday to return. Yet, if an officer of the law pulled him over for a parking violation, Snook would state that he was a student. (T. 150).

Snook began selling cocaine at age 18 or 19. (T. 154). He learned the cocaine trade from Juan Adan. (T. 164). In addition to marijuana, Snook used cocaine, Quaaludes, and Demerol. (T. 155; 157). He obtained Quaaludes illegally from Adan. (T. 158). Snook, age 21 at this trial, stated that he had supported himself through drug usage for the past three years. (T. 160). He spent the profits on cars, food, clothes, travel, vacation, and four apartments and houses. (T. 160).

Snook kept a floor safe in his apartment where he would store large quantities of cocaine. (T. 162-4). He sold cocaine throughout Kansas City and would snort cocaine in public bars. (T. 166-67).

In November, 1981, Snook and Juan Adan, also known as Al, with whom Snook had engaged in various drug deals, drove to Florida to meet Willie Escobar (the "Willie" whose last name Snook told officers he did not know). (T. 82). Adan obtained 12 ounces of cocaine from Escobar. Snook stated that at this time, he was not too familiar with cocaine. When asked how he knew it was cocaine, he responded that it was a white powdery substance. When asked if he tried some, he said he did not recall. Nevertheless, he concluded that it was cocaine. Adan brought it back and Snook and Adan sold it in Kansas City. (T. 83-4). This was the first time Snook had met Willie Escobar. (T. 84).

Willie Escobar was Snook's source for cocaine. (T. 197). [Defendant Rodriguez never supplied or handled cocaine. Snook did not know the defendant and never had any dealings with him.] Snook never sent money to Rodriguez, and never received drugs from him. (T. 210).

During February, 1982, Willie and his wife, Laura Escobar, came to Kansas city to collect money from Adan. Snook drove Willie to the airport. Willie asked Snook if he would work for him (thereby bypassing Adan). Snook agreed. (T. 84). The arrangement was relatively simple: Willie would send cocaine to Snook on consignment, Snook would sell it, and send money to Willie. (T. 84-5). Snook and Escobar used

a courier service at first (known as Delta Dash), but changed to Express Mail due to convenience. (T. 87-89). However, because one shipment of $5,000 was stolen from the post office, the two decided to conduct business in person. (T. 90). On July 1, Snook flew to Miami and gave money to Escobar. Snook could not recall the amount until his recollection was refreshed with a statement he made merely four months prior to this trial; according to the statement, Snook had given $10,000 to Escobar. (T. 90-92).

The next package received by Snook contained cocaine that appeared yellow and melted. He sold some and his customers complained. Snook called Willie Escobar who decided to come to Kansas to resolve the problem. When asked if Willie mentioned if any other person would be coming, Snook responded: "Oh, I don't remember that conversation particularly." The prosecution pressed, asking about Laura, Willie's wife, and elicited the following hearsay: "Yeah. His wife said that he was going to come up with the owner." (T. 94). No name was mentioned. (T. 95).

Snook stated that on July 27, 1982, he met Willie Escobar at the airport in Kansas, who was with "[a] friend of his", the defendant. (T. 95). Snook was introduced to the defendant as Orlando. Snook had never met the defendant before and had never conducted any business of any kind with the defendant. (T. 96; 99; 100). The three drove to Snook's apartment for thirty minutes. Snook recalled no conversation on the way to the apartment. (T. 97).

Snook testified that the next day, he and Willie Escobar discussed the problem with the cocaine. The defendant was present. Snook retrieved the cocaine from his safe and placed it on the living room table. Later, Snook placed $9,000 on the same table. The defendant picked up the money and counted it. (T. 99-101). The defendant and Escobar had much conversation in Spanish which Snook did not understand. (T. 101). When asked if they spoke in Spanish after the cocaine was brought out, Snook responded: "No. It was just

as a normal course they spoke Spanish." (T. 102). Snook drove the defendant and Escobar to two blocks from where Adan resided, and drove away, not wishing Adan to know that he (Snook) was no longer doing business with Adan. (T. 102-3).

Snook was to bring the cocaine to Florida the next day. (T. 102). Snook was told by Escobar that a friend named George would meet Snook at the airport. Snook took the cocaine to Miami and was met by George. Snook did not recognize George, had never met him, did not know if George was the brother of the defendant, and stated that George did not appear to be latin. (T. 104). [The defendant's brother, Jorge, later testified. Snook stated that the brother and George were two different persons.]

They proceeded to a motel where Snook checked in under the alias of Tom Scott. The next day, Snook went to the residence of Escobar and obtained more cocaine. At the residence "was a maid, and there were a couple of girls and Mr. Escobar and Orlando were there." (T. 105).

At Escobar's residence, Snook obtained a lighter color cocaine. There was no discussion about the cocaine. (T. 105). Snook put the cocaine in his suitcase and was arrested upon his arrival at the Kansas City International Airport [as discussed at the outset of this Statement of the Case]. (T. 106). Snook was allowed to leave that evening. (T. 106). He was never formally charged with a crime and never expected to go to jail. (T. 179-80). He admitted that upon arrest, he lied to the police officers. (T. 182-3-4). Snook testified that it was easy for him to lie and he would do so when it was convenient. He would lie to save himself. (T. 187).

Later, Snook struck a deal with the government. In exchange for complete immunity, he would give information to the government. (T. 106-7). [Snook was told that if he cooperated, he would not be prosecuted. (T. 256). Snook's parents were both federal employees — his father worked for Social Security and his mother with the Department of

Agriculture. (T. 139-40).] During the investigation, Snook dealt primarily with Agents Major, Mahan, and Coleman.

Mahan installed a recording device on Snook's telephone. Two calls were made at the apartment. (T. 109). The first call, Plaintiff's Exhibit 6, was between Snook and Laura Escobar and related to a ledger and monies owed to Willie Escobar by Snook. (T. 111). The second call was answered by Laura Escobar, who gave the phone to Willie. The discussion centered around two kilograms of cocaine and monies available. It was mentioned that Al (Adan) was on the way back with "50", meaning $50,000. (T. 113).

In neither of the two calls was Defendant Orlando Rodriguez mentioned by anyone. (T. 190).

The next taped call was made in August, 1982, with the assistance of D.E.A. Agent Lorraine Coleman in Miami. (T. 115-18). The conversation was between Snook and Willie Escobar, also concerning cocaine deals. (T. 119). Another call from Miami was made that month and Snook again spoke to Laura Escobar. (T. 122). Snook returned to Kansas. (T. 123).

The last call made that was taped was placed by Snook from Kansas to Escobar's house in Miami. A maid was reached and Snook left a number which rang in Agent Major's office. (T. 126). Again, the defendant was never mentioned. (T. 193-6).

Within a day or two of the last call, a tape recorder was affixed to the back of Snook. (T. 129). Snook went to a cafeteria known as Putsch's for a meeting arranged by Agent Major. Outside, Agent Major conducted surveillance. Inside, Snook saw Willie Escobar, Tony West, and the defendant, Orlando Rodriguez. Tony West was a regular drug customer of Snook. (T. 175-6). Snook sat next to Escobar. According to Snook, someone suggested that they go to the rest room. Escobar and the defendant started frisking Snook. Snook recalled that West had said that it was "hot" here. Snook pulled his shirt off and ran out of the restaurant. (T. 130-32).

[The tape recorder did not function properly and the recording of the incident is "virtually unintelligible." (T. 243).]

Since the immunity agreement, Snook admitted that he used drugs, although it was understood that he would remain drug-free, in accordance with the law and D.E.A. guidelines. (T. 221-222; 259).

OTHER GOVERNMENT TESTIMONY

Snook's testimony was the crux of the case. Other witnesses associated with the periphery of the investigation testified. Their testimony established, in pertinent part, that no one could corroborate Snook's version of what occurred in the restaurant. (T. 260-263). No agents had been stationed in the restaurant. (T. 260).

After Snook had run from the restaurant, the Defendant Rodriguez was observed walking from the restaurant with West and Escobar. Defendant Rodriguez did not run or exit rapidly. Rodriguez, Escobar, and West proceeded to another area. Rodriguez was eventually arrested without incident. No charges were formally brought until the next day. (T. 268-9).

The government rested its case and the defendant's motion for judgment of acquittal was denied. (T. 274-276).

DEFENSE WITNESSES

Nelson Mesa testified that he was a resident of Miami, married with two children, and a manufacturer of ladies apparel. He has known Orlando Rodriguez for more than five years because he used Rodriguez' clothing business, La Petite France, on a subcontract basis. As a businessman, Mesa stated that Rodriguez was considered among the trade to be a very reliable young man. Mesa added that Rodriguez has a very good reputation and is honest and truthful. When asked of the allegation that Rodriguez was involved in drugs,

Mesa said he did not believe it. (T. 277-281). The government did not cross-examine Mesa.

The defendant's brother, Jorge Rodriguez, age 21, testified that he was a production manager for Orange Industries, a clothing manufacturer. Previously, he had assisted his brother in his company. He has always been close to his brother. He has never seen his brother use drugs, discuss drugs, sell drugs, and has never heard of his brother ever having been involved in drugs. Jorge testified that his brother's reputation in the community for truth was excellent. (T. 281-288).

On cross-examination by the government, Snook was asked to view Jorge. When asked if Jorge was the "George" who took Snook to the motel in Miami at the behest of Escobar, Snook replied in the negative. (T. 289-90).

Admitted into evidence was Defendant's Exhibit No. 3, a composite of business records and checking receipts of the defendant's clothing business for the past few years. (T. 290). Also admitted were the defendant's United States income tax returns from 1976-1981. (T. 291).

The defense rested and the government presented no rebuttal. (T. 292). The jury returned a verdict of guilt. (T. 387).

On appeal, the Eighth Circuit Court of appeals affirmed (App.1-2), and rehearing was denied. (App.3).

REASONS FOR GRANTING THE WRIT

This case represents a conviction based upon "guilt by association" and insufficient evidence which have long been condemned by this Court. Additionally, the Court is asked to resolve the conflict between the decision sought to be reviewed and *United States v. Jackson*, 700 F.2d 181 (5th Cir.1983), discussed below.

The government failed to prove that Orlando Rodriguez knowingly and willfully entered into a conspiracy to distribute cocaine. Rodriguez was placed with co-conspirators physically, but no conversations or acts established proof beyond a reasonable doubt that he was guilty as charged.

Bearing in mind that the standard for review of convictions requires that the appellate court view the evidence in the light most favorable to the government, nevertheless, it is recognized even in the Eighth Circuit that a conviction should not stand where the evidence is not sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty of the crime charged. *United States v. Apker*, 705 F.2d 293, 309 (8th Cir.1983); *Durns v. United States*, 562 F.2d 542 (8th Cir.), *cert. denied*, 434 U.S. 959 (1977).

In the case at bar, Defendant Orlando Rodriguez was charged with conspiracy to distribute cocaine. The indictment alleged that he conspired with Thomas Snook, Laura and Willie Escobar, and Tony West. As was previously stated in greater detail, the government's case turned primarily upon the testimony of Thomas Snook. Assuming for the sake of appellate review that his testimony was credible, the conviction cannot pass constitutional muster because the evidence was legally insufficient. *Jackson v. Virginia*, 443 U.S. 307 (1979) (due process of law requires that a conviction rest upon proof beyond a reasonable doubt; thus, the Fifth Amendment's Due Process Clause has been implicated.)

The government did prove the existence of a conspiracy. Through Snook's testimony, it was apparent that he and Laura and Willie Escobar conspired to distribute cocaine and did buy and sell cocaine. Escobar was Snook's drug source. Numerous telephone calls attested to their illegal actions. But in none of these calls, and in none of Snook's testimony, was Defendant Rodriguez proven to have been a conspirator.

The essence of any conspiracy is an agreement between two or more individuals to commit a crime. *Ianelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *United States v. Moss*, 591 F.2d 428, 434-35 (8th Cir.1979). The conduct of alleged conspirators and the attending circumstances may properly be adduced in support of a conspiracy charge since conspiracy is seldom susceptible of proof by direct evidence, particularly because the hallmarks of conspiracy are "secrecy and concealment." *United States v. Evans*, 572 F.2d 455, 468 (5th Cir.1978). But as the Eighth Circuit has stated:

> However, mere association with an individual engaged in an illegal enterprise does not make a person a conspirator. *United States v. Frol*, 518 F.2d 1134, 1137 (8th Cir.1975); *United States v. Collins*, 552 F.2d 243, 245 (8th Cir.1977). Nor is mere knowledge, approval or acquiescence in the object of an alleged conspiracy sufficient to render an individual a part of a conspiracy. There must exist some element of affirmative cooperation or agreement to cooperate in the object of the conspiracy. *United States v. Hassel*, 547 F.2d 1048, 1053 (8th Cir.1977); *United States v. Collins*, *supra*, 552 F.2d at 245.

United States v. Moss, supra, 591 F.2d at 435.

This case is in conflict with *United States v. Jackson*, 700 F.2d 181 (5th Cir.1983), which held in pertinent part

> Viewing the evidence in a light most favorable to the government, we have little trouble holding that a conspiracy existed and that Whitley was present while parts of the conspiracy were taking place. Beyond that, the evidence shows no criminal conduct on Whitley's part beyond a

> reasonable doubt. Although testimony at trial showed that Whitley joined Jackson and Oliveira in the restaurant, there is no evidence indicating that Whitley knew the nature or purpose of the meeting, or even that a large amount of money was present. The government has offered no evidence indicating that Whitley was present during conversations in which the conspiracy was discussed. [Footnote: At trial, Jackson testified that he had met with Whitley on several occasions and that he had seen Whitley with Hicks before the encounter in Sambo's. Jackson stated that he never discussed drug transactions with Whitley. Jackson also did not know of Whitley's relationship with Hicks.]

United States v. Jackson, supra, 700 F.2d at 185.

Similarly, Defendant Rodriguez was not present during the conspiratorial conversations between Snook and Escobar. Also similarly, Snook did not know of Rodriguez' relationship with Escobar except that he was introduced as a friend.

This is the type of case where the appellate court should "not lightly infer a defendant's knowledge and acquiescence in a conspiracy." *Jackson, supra*, at 185. Juries must not be allowed to convict on mere suspicion and innuendo. *Jackson, supra; United States v. Littrell*, 574 F.2d 828, 833 (5th Cir.1978). The government cannot support a conviction for conspiracy by presenting evidence that merely places the defendant in "a climate of activity that reeks of something afoul." *United States v. Galvan*, 693 F.2d 417, 419 (5th Cir.1982). Yet, the Eighth Circuit's affirmance squarely collides with these principles.

The case against the Escobars and Snook was substantial. But Orlando Rodriguez was the unfortunate victim of the dragnet-effect sometimes resulting from undercover conspiracy investigations turning upon the actions of a

desperate criminal, here, Thomas Snook, a self-admitted liar who would implicate an innocent person if he thought he would be spared thereby.

The conviction of Orlando Rodriguez, viewing the evidence as a whole, and without blinding ourselves to his lack of criminal past, his character witnesses, the introduction into evidence of his business records and tax returns, and his respected clothing business, rested upon too slender a reed for affirmance and imprisonment for fifteen years. Certiorari review is warranted.

CONCLUSION

The Petitioner requests that certiorari review be granted, that the Fifth Circuit *Jackson* decision be approved, and that his conviction be set aside for lack of constitutionally sufficient evidence.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1297

United States of America,

Appellee,

v.

Orlando Rodriguez,

Appellant.

Appeal from the United States District Court for the Western District of Missouri

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Submitted: February 17, 1984

Filed: February 24, 1984

Before ROSS, ARNOLD, and BOWMAN, Circuit Judges

PER CURIAM.

Orlando Rodriguez appeals his judgment of conviction following a jury trial of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. The indictment charged that Rodriguez, Guillermo Escobar, Laura Escobar, and Thomas Snook conspired to distribute cocaine in the Kansas City, Missouri, area. Rodriguez concedes that the government proved the existence of a conspiracy involving the Escobars and Snook through the use of Snook's testimony, recordings of telephone conversation, and other evidence. For reversal he argues that the evidence was insufficient to establish that he was a participant in the conspiracy. We disagree and affirm his conviction.

In reviewing the record, we must, of course, view the evidence in the light most favorable to the jury's verdict and accept as established all reasonable inferences therefrom which support the verdict. *United States v. Verdoorn*, 528 F.2d 103, 105 (8th Cir.1976); *United States v. Baumgarten*, 517 F.2d 1020, 1026-27 (8th Cir.), *cert. denied*, 423 U.S. 878 (1975). Accordingly, we have thoroughly reviewed the record in this case, including all trial transcripts, and we find ample evidence in support of the jury verdict. The verdict is therefore affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEAL,
EIGHTH CIRCUIT.

(Not to be published)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1297-WM.

September Term, 1983

UNITED STATES OF AMERICA,

Appellee,

vs.

ORLANDO RODRIGUEZ,

Appellant.

Appeal from the United States District
Court for the Western District of Missouri

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 22, 1984